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RAZI AMNIN

v.

PP

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HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL APPEAL NO: 42-06-2006]
28 SEPTEMBER 2009

- C **CRIMINAL LAW:** *Penal Code - Section 376 - Rape - Appeal against conviction and sentence - Penetration, whether established - Testimony of complainant - Corroboration from medical and eyewitness evidence - Prosecution failing to tender report on vaginal smear - Whether adverse inference should be presumed against prosecution - Findings of fact by trial judge, whether based on proper evaluation of testimony of witnesses and medical reports*
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E This was an appeal by the defendant against his conviction under s. 376 Penal Code for the rape of a 14-year-old girl ('the complainant') and the sentence of 10 years' imprisonment imposed. The defendant was alleged to have raped the complainant at the backseat of a car whilst their mutual acquaintance ('PW12') was seated at the front passenger seat. The main grounds of appeal were that the sessions judge had erred in: (i) accepting the complainant's testimony that there was penile (and not digital) penetration; (ii) not invoking an adverse inference under s. 114(g) Evidence Act 1950 ('EA') against the prosecution for failing to tender the medical report on the complainant's vaginal smears and rectal swabs; (iii) rejecting the defence's suggestion that it was PW12 (and not the defendant) who had intercourse with the complainant at the material time; and (iv) failing to consider the gynecologist's evidence that the complainant's torn hymen resulted from an 'attempt at penetration' and not 'actual penetration' itself.

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Held (dismissing the appeal):

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- (1) Having seen and heard the complainant, and having assessed and appraised her credibility and trustworthiness as a witness, the sessions judge was in the best position to decide whether her testimony should be accepted. He was entitled to accept the complainant's testimony that there was penile penetration notwithstanding the fact that she did not see it. He had found
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that the complainant's evidence on penetration was corroborated by the medical evidence and the evidence of PW12. The sessions judge's conclusions were thus consistent with his findings of fact. (paras 4-19)

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- (2) It is not in every case that the non-production or suppression of evidence will trigger s. 114(g) EA. The presumption is restricted only to cases where there is suppression of relevant, material evidence. The medical report on the complainant's vaginal smears was no longer relevant or important as both sides had agreed that there was no ejaculation. In any case, penetration alone (without ejaculation) would be sufficient to constitute the sexual intercourse necessary to the offence. (paras 20-23)

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- (3) The sessions judge preferred the evidence of both the complainant and PW12 that it was the defendant who had raped the complainant and that PW12 did not at any time have intercourse with the complainant. There was no reason to disturb such findings of fact. (para 24)

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- (4) The gynaecologist's testimony was twofold, namely: (i) that the bruise, inflammation and tenderness over the posterior fourchette was caused by an attempt at penetration; and (ii) the fresh hymen tear was consistent with penile penetration. The defence had misconceived this part of the evidence. (paras 15, 25 & 26)

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- (5) The sessions judge's conclusions were based upon a proper evaluation of the evidence of the defendant, the complainant, PW12 and the gynecologist. (paras 32-36)

[Conviction and sentence affirmed.]

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Case(s) referred to:

D A Duncan v. PP [1980] 1 LNS 12 (*refd*)

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*)

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PP v. Ling Tee Huah [1980] 1 LNS 212 (*refd*)

Sidek Ludan v. PP [1995] 1 LNS 219 HC (*refd*)

Legislation referred to:

Evidence Act 1950, s. 114(g)

Penal Code, s. 376

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A *For the appellant - Lawrnee Gnanapragasam; M/s Rahim & Lawrnee*
For the respondent - Azeezi Nordin DPP

Reported by Gan Peng Chiang

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JUDGMENT

Ahmadi Asnawi JC:

C [1] The charge against the appellant before the Segamat Sessions Court was for an offence under s. 376 of the Penal Code for raping PW1, a girl who was then 14 years and four months old. The offence was alleged to have been committed at about 5pm on 8 August 2002 at the parking lot of Hutan Bantang, Sungai Bantang, Bekok, Segamat. He was found guilty of the offence and D was convicted of the same by the learned Sessions Judge and sentenced to ten years imprisonment from the date the sentence was pronounced. The appeal before me was both against the said conviction and sentence.

E [2] The facts appears to be fairly straight forward. PW12 and the victim, PW1 had known each other well before the incident on 8 August 2002. On the day in question PW1 was at her friend's house, PW8. Later in the day PW12 together with the appellant, came over to PW8's house. They came in a car bearing registration F number CAC 7260 driven by the appellant. PW1 joined them and left for a drink in town. However at about 5pm they ended up at the parking lot of Hutan Bantang, Bekok, recreation spot. The appellant was a complete stranger to PW1.

G [3] Soon after, the appellant left the driver's seat and entered into the rear seat of the said car, where PW1 was seated. She was seated there throughout the journey. The appellant then started touching, embracing and kissing PW1. There appears to have been no resistance at that point of time from PW1. It ended up in the H appellant stripping off PW1's trousers and raping her. PW12 who was seated in the front seat next to the driver's seat through out the incident witnessed what took place at the rear seat of the car but was too shocked and terrified to intervene. So much for the facts of the case.

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Penile Penetration

[4] Now the appellant's main complaint appears to be the learned Session Judge's acceptance of PW1's testimony that there was indeed penile penetration of appellant's private parts into PW1's private parts. The argument is grounded upon PW1's testimony that she did not see the appellant's private parts entering into her private parts. All that she said was that she felt something entering into her private parts followed by a searing pain thereat. At the same time, she did not notice where the appellant's hands were. It was thus submitted that PW1's evidence on this issue is presumptuous and that it could have been anything that could have had entered into her private parts. It was suggested that there was only finger penetration.

[5] It is trite that it is the business of the trial judge to assess and appraise the credibility of the witness appearing before him. It is for him to make a proper assessment of the witness upon the evidence given as tested against the whole of the evidence in its entirety and tested against all the probabilities of the case. To a certain extent he is aided by the demeanour of the said witness testifying before him. The witness's promptitude or hesitation in answering the questions, the mannerism in answering the questions, the reactions to the questions put, the tone of the voice, the stares and blink of the eyes, the overall intelligence, and a host of other minute body language were all said to have played a role in such appraisal. Having seen and heard the witness, the trial judge is the best person to make out the kind of witness testifying before him. It is therefore his primary business to appraise whether the witness is a credible witness of truth and that his/her testimony is worthy of acceptance without more.

[6] In this case before me, the learned Sessions Judge has seen and heard PW1. Having done so he concluded that PW1 is a credible witness and accepted her testimony that it was the appellant's private parts that had entered into her private parts. He opined that there were ample corroborative evidence to support such findings of penile penetration from the testimonies of the doctors (PW2 and PW9) who examined PW1 and also PW12 who remained seated in the car through out the incident. He saw and heard these witnesses and found them to be truthful and credible witnesses

- A whose testimonies could be relied upon. It would thus be wrong for
me to judge otherwise in the absence of hard, compelling reasons to
do so. On the facts, the learned Sessions Judge was entirely correct
to come to such conclusion. These are findings of facts and I am
in full agreement with his findings therein and I find no plausible
B reason to depart there from. He had considered every material aspect
there is to be considered that leaves no room for interference.

- [7] Now, going into the details. PW1 testified that after the
initial, brief engagement, she was made to lie down at the rear seat
C of the car. Her legs were pinned down by the appellant's legs while
her hands were held down by one of the appellant's hand. The
appellant next used his other hand to open and pull down her
trousers and panties. The appellant then opened his own trousers.
She tried to resist the appellant's advances but failed.

- D [8] Next PW1 felt something entered into her private parts. She
was very sure that something had entered into her private parts
because of the searing pain that followed. She was in a lying down
position with her legs up. The appellant was on top of her with his
face directly in front of her face. She did not see the appellant's
E private parts entering into or was inside her private parts but was
very certain that it was the appellant's private parts that had
penetrated into her private parts and nothing else – see pp. 15, 6,
17, 23 and 24 of rekod rayuan (RR). She added that she has had
no experience in sexual intercourse prior to the incident but knew
F exactly what sexual intercourse is all about and what it entails. She
was crucified on this issue of penetration during her cross-
examination but she was consistent in maintaining her position that
it was the appellant's private parts that had penetrated into her
private parts. There was no seminal ejaculation though.

- G [9] In my view, PW1 was just being truthful. Positional wise
during the rape incident, obviously there can be no way for PW1 to
be able to see the appellant's private parts penetrating into her
private parts. She was lying down with her legs up and the appellant
was on the top of her body with his face directly in front of her
face. But she was able to strongly feel the appellant's private parts
penetrating into her private parts. She was equally adamant that it
was not the appellant's finger(s) that had penetrated into her private
H parts.

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[10] Now, as far as sexual intercourse is concerned it is governed by nature. One need not be married to know what is inside and what is outside. Equally, there is no necessity of gaining experience for a woman to know whether the male's private parts or other foreign objects had entered into her private parts, as nature would have taken its own course. As an analogy if one were to close his eyes and another were to put a piece of wood into his mouth, he would know instantly that a piece of wood was put into his mouth. Likewise if an iron rod or banana or finger or hot water or stone or sand was put into his mouth he would instantly recognise what was the object that was put into his mouth even though his eyes were tightly shut. Such was human instinct and nature.

[11] It thus behoves that the courts should be practical and adopt the common sense principle when dealing with crimes of this nature and not putting the victims of such crimes under unnecessary innuendoes, ridicule and derision. In this appeal before me, the learned Sessions Judge has seen and heard the testimony of PW1 himself. He concluded that PW1 was a credible and truthful witness and accepted her testimony that it was the appellant's private parts that had penetrated into her private parts and not any other foreign objects. This is a finding of fact by the learned Sessions Judge. I have scrutinized the totality of PW1's testimony and on the facts and evidence it was not wrong for the learned Sessions Judge to come to such a finding. Evidently the said finding is not perverse. I have no reason plausible enough to interfere with the said finding. Thus, the appellant's complaint in respect of the factum of appellant's private parts penetrating into the PW1's private parts is verily without basis.

Corroborative Evidence

[12] Of course, the learned Sessions Judge did not rely solely on the evidence of PW1 to account for such finding. He also looked elsewhere to fortify his finding.

[13] PW2 was the medical officer, attached at Segamat Hospital who conducted the general physical examination on PW2. The relevant part of his findings on PW1's external genitalia were:

- Bruise, inflammation and tenderness over posterior fourchette.
- Fresh tear of hymen at 4, 7 and 11 o'clock position.
- A nail mark at the right buttock closer to the posterior, at the inner aspect of the thigh.

A [14] PW1 was later referred to the O & G Specialist, PW9. PW9 confirmed the aforesaid findings by PW2. PW2's medical report on PW1 is exh. P5 (pp. 181 and 184 of RR).

B [15] PW9 confirmed that she was requested to do a gynecological examination on PW1 and was present during the said external and gynaecological examination conducted by her medical officer Dr Kalavathi, DW3. She confirmed the findings as found by DW3. DW3's report is exh. P6 (pp. 182 and 184 of RR). The findings in exh. P6 are materially the same as in exh. P5. PW9 confirmed that C the hymen tear at 4, 7 and 11 o'clock position was a fresh tear less than 72 hours old. The bruise, tenderness and inflammation over the posterior fourchette was caused by attempts at penetration, more due to attempts by penile penetration. She also confirmed that prior D to the examination, PW1 has no sexual activity and it was possible that the fresh hymen tear was due to penile penetration. It could also be due to penetration by other causes. But she was non-committal as to the exact cause of the said hymen tear. However, the learned Sessions Judge accepted that the fresh hymen tear was corroborative evidence of penile penetration. On the facts he was not E in error in coming up with such finding.

Whose Private Parts Entered Into PW1's Private Parts

[16] There are ample authorities to suggest that the fresh tear suffered by PW1's hymen would suffice to corroborate PW1's F testimony that there was penetration into her private parts. But whose private parts? This was the appellant's next ground of appeal. It was the learned counsel's submission that both PW1 and PW12 conspired to fix the appellant with the crime and the said crime in fact was perpetrated by PW12. This was indeed a very serious G accusation. However the appellant did not offer any reason as to why both PW1 and PW12 would want to fix him with such a crime with dire consequences. Nor was it ever suggested that both PW1 and PW12 had harboured an axe to grind against the appellant. All the more so when both the appellant and PW12 were friends. They H came together to fetch PW1 in a car borrowed by PW12 from his brother, PW5. In fact the appellant was the one who was driving the car all over. Equally, PW1 knew the appellant barely hours before the incident. There is no reason for PW1 to concoct such evidence implicating the appellant for no apparent cause or causes. The I

appellant also did not challenge the testimonies of PW1 and PW12 that at the parking lot, he entered into the rear seat of the car to where PW1 was seated and started touching, embracing, kissing and later removing PW1's trousers and his own trousers. The appellant also did not challenge PW12's testimony that he was on top of PW1's body. Both the appellant and PW12 were assaulted by PW1's relatives over PW1's failure to return home that night but the appellant was the only one who admitted to PW1's parents and uncles that he had sex with PW1. During the said admission, the appellant's own parents were also present.

[17] For all the aforesaid reasons, I find that learned counsel's submission that it was PW12 who had sex with PW1 could not hold water. I will deal with PW12's evidence later.

[18] PW1's testimony was cogent and intact. She passed the crucial test of a severe cross-examination and her testimony that it was the appellant's private parts that penetrated into her private parts stands uncontroverted and was factually accepted by the learned Sessions Judge. The medical evidence as provided by PW2 and PW9 offered the best corroborative evidence of the factum of such penetration. In the event it was not wrong for the learned Sessions Judge to find that PW1's testimony in respect of the factum of penetration was amply corroborated by the medical evidence. The hymen tear was not occasioned by the act of any other person other than the appellant.

Applicability Of s. 114(g) Of The Evidence Act 1950

[19] Learned counsel further submitted that as per medical report exh. P5, wet smear from introitus, wet smear from fornix for spermatozoa, smear from posterior fornix and endocervix for microscopic and bacteriology, rectal swab for spermatozoa and full blood count, VDRL, HIV screening, Hepatitis screening, blood grouping and rhesus factor, UFEME, DPT were taken for laboratory investigation. However the result of such investigation were not revealed in court. It was submitted that the result of the investigation is necessary to prove the presence of either the appellant's or PW12's spermatozoa inside PW1's vagina. The failure

- A by the prosecution to produce the result of such investigation clearly warrants the court to involve s. 114(g) of the Evidence Act 1950.

- [20] I have perused through the notes of evidence of the proceedings in the court below. There is nothing to indicate that the aforesaid items were handed over to the I.O of the case, PW1, by either PW2 or PW9. The I.O also made no mention about receiving these items from the two doctors or from the said hospital. Upon query, the learned DPP replied that the said items were not sent to the Chemistry Department for analysis. Would the non production of these items and the non investigation of the same by the relevant authorities prove fatal to the prosecution? I think not. It is trite that not all cases of non production or suppression of evidence would invite s. 114(g) of the said Act into play. The said provision is restricted only to the non production or suppression of material evidence relevant to the case (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221.)

- [21] The corollary is whether the said swabs and wet smears are material evidence relevant to prove the case. It is apparent that the main objective in taking the said swabs and wet smears was to trace the presence of spermatozoa either inside or outside PW1's vagina. But PW1 testified that there was no seminal ejaculation inside or outside her vagina by the appellant. This evidence was not challenged by the appellant. As regards PW12, she categorically denied having sex with him. In such event the investigation of the said swabs and wet smears assumed no importance at all. Its relevancy is negated by the absence of seminal ejaculation and exclusion by PW1 that she had sex with PW12. Therefore there is no basis at all to invoke s. 114(g) of the Evidence Act to operate adversely against the prosecution. The same reasoning would apply to the prosecution's failure to send the said car where the rape took place to the Chemistry Department though the said car was seized by the police and the clothings of PW1, PW12 and the appellant which were not taken by the I.O and sent to the Chemistry Department for analysis. These issues were also part of the stated grounds of appeal.

- [22] What is a lot more material in sexual offences of this nature are the ingredients of the offence, the most vital being the identity of the offender and the sexual act itself, ie, the factum of penetration of the male private parts into the female private parts.

The testimony of PW1 very clearly adverted to the sexual act committed by the appellant. Obviously, the presence of spermatozoa inside PW1's private parts or presence of seminal stains at the rear seat of the car or on the clothings of PW1, PW12 and the appellant are not ingredients of the offence of rape. But penetration is. In fact even the slightest penetration is sufficient to constitute the offence of rape – see *Sidek b. Ludan v. PP* [1995] 1 LNS 219; [1995] 3 MLJ 178 at p. 186. The offence is complete without seminal ejaculation. The presence of spermatozoa or seminal stains would only act as corroborative evidence. Its absence is not fatal to the prosecution if there are other evidence sufficient to corroborate the commission of the offence.

Involvement Of PW12

[23] PW12 testified that during the incident he was seated at the front seat next to the driver's seat. At the parking lot, the appellant left the driver's seat and entered into the rear seat where PW1 was. Soon after both were engaged in some conversation. Then he saw the appellant kissing and embracing PW1. Next, he saw both of them lying down. The appellant was on top of PW1. He also saw the appellant removing his own trousers and PW1's trousers. Their shirts were intact. He saw and was certain that both of them were having sex though he did not see the appellant's private parts penetrating into PW1's private parts. The incident lasted about 10 minutes or so. PW1 did not resist nor asked for help during the duration. Out of the 10 minutes, he was watching them for about 7 minutes. He denied having sex with PW1 though vigorously cross-examined on the issue. He did not intervene because he was too shocked and terrified with what he saw.

[24] It is apparent that PW12's evidence lends a lot of credence to PW1's evidence in respect of the fact that the appellant went to the rear seat and started kissing and embracing PW1, PW1 was lying down at the rear seat of the car, the appellant removed PW1's trousers and his own trousers and that the appellant's body was on the top of PW1's. PW12 went through a lengthy cross-examination but he remained unscathed. These part of PW12's testimony was not challenged by the appellant. What was asked at length was whether he saw the appellant's private parts entering into PW1's private parts to which he admitted that he did not see the same, though he was adamant that both of them were having sex as he

- A saw it on TV. It is worthy to note that it was put to him that he was the one having sex with PW1 at a point when the appellant left the car to buy drinks elsewhere leaving both PW1 and PW12 behind in the car to which he denied. PW12 also denied having sex with PW1 when the appellant left the car somewhere along the road
- B to look for petrol when the car went out of gas, again leaving both PW1 and PW12 behind in the car. These evidence were accepted by the learned Sessions Judge with his findings that it was the appellant who committed the offence. Having perused through the evidence of both PW1 and PW12, I have no reason to disagree with
- C the said findings. PW1 exonerated PW12 of the crime altogether. There is thus nothing to connect PW12 with the commission of the offence. The conspiracy theory adverted to by the appellant has no basis on the facts and has been dealt with earlier.

D Attempts Of Penetration

- [25] The next ground of appeal alleges that the learned Sessions Judge erred in fact and in law when he failed to take into consideration PW9's testimony that what had really happened was an attempt of penetration. It was submitted that the hymen tear was
- E due to attempt of penetration and not caused by penetration.

- [26] However, on the evidence it is my view that learned counsel's submission on this point is misconceived. The medical evidence clearly shows that there were two separate findings of (i) fresh
- F hymen tear and (ii) bruise, inflammation and tenderness over the posterior fourchette. All that was said by PW9 was that the bruise, inflammation and tenderness over the posterior fourchette was caused by attempt of penetration, consistent with attempt by penile penetration. The posterior fourchette is distinct from the hymen as
- G illustrated at p. 183 of the RR. The two injuries were at different localities altogether. It simply means that the injuries to the posterior fourchette was caused when attempts or during attempts to penetrate the vagina was made. PW9 did not say that the hymen tear was due to attempt at penetration. There was complete hymen
- H tear and the complete hymen tear was due in fact to penetration. Again PW9 testified that the said hymen tear was consistent with penile penetration. PW9 also qualified herself by saying it could also possibly be caused by insertion of fingers into the vagina. This of

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course is a general statement we hear very often enough from specialist. Thus we have to go back to PW1's testimony to gather what has penetrated into her vagina causing the said hymen tear. In this respect, PW1's testimony that the appellant's private parts had penetrated into her private parts was unequivocal. Hence in my view there was no error committed by the learned Sessions Judge in terms as submitted by learned counsel. I have no hesitation in dismissing this ground of appeal.

The Tissue Paper

[27] PW1 testified that after the rape incident was over, she saw the appellant wiped something using a tissue paper. The tissue paper was then thrown away at the parking lot. This tissue paper was recovered by the I.O. at the parking lot after the appellant pointed the same to him. This tissue paper was sent to the Chemistry Department and the I.O. testified that the result of the test conducted by the Chemist on the tissue paper was negative. There were no traces of spermatozoa on the tissue paper. The result is not unsurprising though as PW1 merely said that she saw the appellant using a tissue paper to wipe something. She did not say that the tissue paper was used to wipe out remains of seminal discharge on his person.

[28] However the ground of appeal in respect of this tissue paper by the appellant rested, it was submitted, upon the ruling by the learned Sessions Judge who ruled the recovery of the said tissue paper unfavourably against the appellant in spite of the clear evidence that there were no traces of seminal stains on the said tissue paper.

[29] Upon perusal of the grounds of judgment, it is again my view that learned counsel's submission on this issue is misconceived. All that was considered by the learned Sessions Judge is this "...Keterangan ini menyokong keterangan SP1 yang mengatakan bahawa selepas OKT merogolnya SP1 nampak OKT mengesat sesuatu dengan tisu ..." (p. 168 of RR, para. 6.6). A careful reading of the said passage clearly indicates that it simply means that the recovery of the said tissue paper corroborated SP1's testimony that the appellant used a tissue paper to wipe something after the rape incident was over. The learned Sessions Judge did not rule that the recovery of the said tissue paper is corroboration of penile penetration into PW1's private parts as was submitted by learned counsel.

- A [30] In the event it is my view that this ground of appeal is again without any basis.

The Findings That The Appellant's Defence Is A Defence Of Afterthought

- B [31] This constitutes the appellant's next ground of appeal. The appellant took issue that the crux of his defence that it was PW12 and another person at the kilang (PW6) who had sexual intercourse with PW1 was found to have been an afterthought by the learned Sessions Judge. It was submitted that the said defence was put to both PW1 and PW12 during the cross-examination of the two witnesses – as seen at pp. 35, 109, 110 and 111 of the RR. However none was put to PW6. It was thus submitted that the defence is not one of afterthought and that the learned Sessions Judge had failed to properly consider the same.
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- D [32] Be that as it may, in my view the emphasis of the learned Sessions Judge leaned more to the findings that the defence posited was a mere denial. He tested the evidence of the appellant against the evidence of both PW1 and PW12 and at the end of the day
- E accepted the evidence of PW1 and PW12 and found the defence to be a mere denial. He has seen and heard these witnesses and on the facts and evidence he was not wrong to come to such a conclusion.
- F [33] The learned Sessions Judge alluded to the fact that the appellant did not deny the major parts of the testimonies of PW1 and PW12. The appellant did not deny going into the rear seat of the car, did not deny touching, embracing, kissing and later removing PW1's trousers and his own trousers. The appellant also
- G did not deny the testimonies of PW1 and P12 that he was on the top of PW1's body when both were naked from the waist down. The only part which he denied was inserting his private parts into PW1's private parts. On the strength of the testimonies of PW1 and PW12 which he had accepted, it was not wrong for the learned Sessions
- H Judge to conclude that the defence of the appellant was a defence of mere denial and ought to be rejected. It is trite law that mere denial without other proof to reasonably dislodge the prosecution's case is insufficient to earn an acquittal – see *D A Duncan v. PP* [1980] 1 LNS 12; *PP v. Ling Tee Huah* [1980] 1 LNS 212. As
- I regards to PW6, it was never suggested to PW6 that he had sex with PW1. Verily the learned Sessions Judge was right in rejecting such a defence. I am with him there.

[34] The learned Sessions Judge also considered the evidence of DW2. He found the evidence of DW2 to be irrelevant. I am also with him.

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[35] The learned Sessions Judge also considered the evidence of DW3, Dr. Kalavathi, who conducted the gynaecological examination on PW1. She testified that PW1's hymen tear was a fresh tear, consistent with penile penetration rather than finger penetration. The learned Sessions Judge opined that DW3's testimony merely fortified the prosecution's case. Again I am with him.

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[36] For all the reasons given above I dismissed the appellant's appeal without more. His conviction by the court below is affirmed. There were no submissions upon the sentence imposed by either the defence or the prosecution. Hence the sentence imposed by the learned Sessions Judge is also affirmed.

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